

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 January 2014

Public Authority: Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested information prepared in advance of a possible Labour Party victory in a general election in 1991 or 1992. The Cabinet Office confirmed it held some information within the scope of the request but cited the following exemptions as its basis for refusing to provide that information; section 27 (international relations); section 31 (law enforcement); section 35 (formulation development of government policy); section 38 (health and safety); and section 40(2) (unfair disclosure of personal data). It also refused to confirm whether it held any other information within the scope of the request citing section 23 (security bodies) and section 24 (national security) as its basis for doing so. Following an internal review, it withdrew reliance on section 35 and introduced reliance on section 36 (effective conduct of public affairs). During the Commissioner's investigation, it withdrew reliance on section 31 and section 38.
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on section 36 in relation to the majority of the information that it has confirmed it holds. However, a small portion of the information that it has confirmed it holds is not exempt from disclosure. The Cabinet Office is entitled to refuse to confirm or deny whether it holds any other information within the scope of the request by virtue of section 23 and section 24.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

- Disclose the information listed in a Confidential Annex to this Notice.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 26 November 2012, the complainant requested information of the following description:

"I am sending this request under the Freedom of Information Act to ask for the following information:

1. Copies of all documents prepared in 1991 or 1992 for Neil Kinnock to read in the event he became prime minister
 2. Copies of all information still held relating to preparations made for the possible election of a Labour government in 1991/2".
6. On 21 December 2012, the Cabinet Office responded. It confirmed that it held information within the scope of his request but refused to provide it citing the following exemptions as its basis for doing so:
- section 27(1)(a), (b), (c) and (d);
 - section 31(1)(a);
 - section 35(1)(a);
 - section 38(1)(a); and
 - section 40(2).
7. It also refused to confirm or deny whether it held other information within the scope of the request citing section 23(5) and section 24(2) as its basis for doing so.
8. The complainant requested an internal review on 21 December 2012.
9. He chased a response to this request on 13 March 2013 and the Cabinet Office eventually sent him the outcome of its internal review on 8 April 2013. It upheld its original position with regard to most of the exemptions it had sought to rely on but it revised its position in relation to section 35 and, instead, introduced reliance on section 36(2)(b) and (c).

Scope of the case

10. The complainant contacted the Commissioner on 4 June 2013 to complain about the way his request for information had been handled. He argued that the Cabinet Office had applied exemptions inappropriately and had considered the balance of public interest incorrectly, particularly given the age of the information. He also observed that the documents caught by the scope of the request were likely to include information of significant historical interest.
11. There were considerable delays on the Cabinet Office's part in providing the Commissioner with access to the withheld information and its arguments in support of its position regarding exemptions. The Commissioner served an Information Notice on the Cabinet Office on 24 September 2013.
12. When the Cabinet Office eventually provided its arguments to the Commissioner, it withdrew reliance on section 31 and section 38 but confirmed its position in respect of the other exemptions it had cited. The Commissioner has therefore considered
 - whether the Cabinet Office is entitled to rely on section 27(1)(a), (b), (c) and (d); sections 36(2)(b)(i) and (ii) and section 36(2)(c); and section 40(2) as a basis for withholding information that it is prepared to confirm that it holds; and
 - whether the Cabinet Office is entitled to rely on section 23(5) and section 24(2) as a basis for refusing to confirm or deny whether it holds other information within the scope of the request.
13. One of the Commissioner's officers viewed the withheld information in situ on 20 November 2013.

Reasons for decision

14. Section 1 of the Act imposes two connected duties upon public authorities. The first is the duty to provide confirmation or denial as to whether requested information is held. This is subject to exemptions. The second is the duty to provide that requested information. This is also subject to exemptions. The Cabinet Office's duty to comply with both elements of section 1 are considered here.
15. Consequently, this decision notice is in two parts. The first part deals with whether the Cabinet Office is entitled to rely on provisions of section 36, section 27 and section 40 as a basis for withholding

information described in this request. It has already confirmed that it holds this information but has cited a number of exemptions as its basis for refusing to provide it.

16. The second part of the decision notice considers the Cabinet Office's view that it can refuse to confirm or deny whether it holds other information within the scope of the request. It has cited the security bodies and national security exemptions in support of this position (section 23 and section 24).

Section 36

17. The Cabinet Office has cited the exemptions provided by subsections 36(2)(b)(i) and (ii) and section 36(2)(c) as its basis for refusing to provide certain information within the scope of the request.

18. The provisions of section 36(2)(b) apply where disclosure of the requested information:-

would, or would be likely to, inhibit

- (i) the free and frank provision of advice, or
- (ii) the free and frank exchange of views for the purposes of deliberation, or

19. Section 36(2)(c) applies where disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

20. Consideration of these provisions is a two-stage process. First, the exemptions must be engaged, and secondly, the exemptions are qualified by the public interest. This means that the information must be disclosed if the public interest in the maintenance of the exemption in question does not outweigh the public interest in disclosure.

21. Covering first whether these exemptions are engaged, the exemptions provided by section 36 can be cited only on the basis of the reasonable opinion of a specified qualified person (QP). Reaching a conclusion as to whether these exemptions are engaged involves establishing whether an individual authorised to act as QP has given an opinion and whether, if such an opinion was given, that opinion was reasonable. If these conditions are met, the exemptions are engaged.

22. Section 36(5)(a) provides that the QP for a government department is any Minister of the Crown. The Cabinet Office has provided evidence that in this case the Attorney General was the QP and that the opinion on the use of these exemptions was given on 26 March 2013.

23. The Commissioner accepts, therefore, that these exemptions were cited on the basis of the opinion of an authorised QP. The next step is to consider whether the opinion of the QP was reasonable. In forming a conclusion on this point the Commissioner has considered the explanation provided to the QP in a submission prepared to assist him in the formation of his opinion, a copy of which was supplied to the ICO.
24. The view of the QP related to the importance of providing frank and succinct briefings to an incoming Prime Minister so that he or she is fully apprised of important issues in the first days of taking office. This assists in the ready transition from one administration to the next and avoids what could be characterised as an interregnum where the authority and direction of government is unclear. It was not asserted that disclosure would necessarily make briefings less frank. Instead the briefings would be drafted with an eye on likely future publication and would be more likely to be excessively detailed – the Cabinet Office used the description “verbose”. The necessity of succinct briefings to an incoming Prime Minister was emphasised as were the benefits this brought to the process of transition. The broad scope of topics covered by the briefing was also emphasised.
25. Having viewed the withheld information, the Commissioner accepts that it was reasonable for the QP to hold the opinion that disclosure would be likely to have a detrimental effect upon the process of transition to a new administration. The Commissioner therefore accepts that the opinion of the QP was reasonable and so the exemptions provided by sections 36(2)(b)(i) and (ii) and section 36(2)(c) of the FOIA are engaged.

Public interest

26. The next step is to consider the balance of the public interest. The role of the Commissioner here is to consider whether the public interest in disclosure is outweighed by the public interest in maintaining the exemption. When assessing the balance of the public interest in relation to section 36, the Commissioner will give due weight to the reasonable opinion of the QP, but will also consider the severity, extent and frequency of the inhibition that he has accepted would result through disclosure.
27. The Cabinet Office said it had considered the following factors when assessing the balance of public interest:
 - The age of the information added some weight to the public interest in disclosure.

- The law on transferring official documents to the National Archives was in transition but the information requested in this case, was not yet of a time period that was to be transferred as deemed by Parliament.
 - Some of the issues covered in the withheld information remain of current interest.
 - A new administration requires a clear briefing so that it can take prevailing circumstances into account when implementing the policies it has undertaken to implement.
 - There was a presumption of confidentiality for information of this nature which, if undermined, would affect the quality of clarity and brevity expected in such documents
 - There is a long-standing convention to the UK constitution that the transition period between administrations is swift and that the incoming administration should reach effectiveness soon after coming to power. Disclosure would undermine this convention in the manner described in the previous bullet point to the detriment of the public interest.
28. The view of the Commissioner is that for the majority of the withheld information the inhibition envisaged by the Cabinet Office would be quite severe. One particular virtue of the withheld information is the succinct and frank approach taken by those who drafted the withheld information. The Commissioner entirely agrees that an incoming Prime Minister is better served by this style as he or she acclimatises quickly to the business of government. However, in relation to a small portion of the withheld information, the Commissioner does not find that disclosure would give rise to severe inhibition to the process of briefing an incoming Prime Minister. His reasons for reaching this view in relation to this information are set out in a Confidential Annex to this Notice. His decision as to the balance of public interest in relation to the information in question is also set out in a Confidential Annex to this Notice.
29. As to the extent and frequency of this inhibition, the Commissioner is satisfied that the inhibition would be likely to arise with every change of administration. He acknowledges a three-fold effect namely, likely inhibition to the frank provision of advice; likely inhibition to the free and frank exchange of views for the purposes of deliberation; and, as a separate but related consequence, an adverse impact on the business of government at a time when it is not in the public interest to impede it. Traditionally, and now by statute, there is a general election every five years. While there may not be a change in administration every five years, it is reasonable to assume that there might be. There can be little

public interest in undermining the process of transition on such a relatively regular basis.

30. There is a clear constitutional convention in the UK that the transition to a new government is swift. This contrasts with, for example, the United States, where presidential elections generally take place in November every four years but the new president is not sworn in until the following year. The Commissioner accepts that there is a compelling public interest in understanding how this transition works in practice in the UK which could be served by disclosure in this case. However, he notes a wealth of information that is already in the public domain about the process.^{1 2}
31. The Commissioner acknowledges that the information, while relatively recent, is not so recent as to relate to serving ministers or members of the current Opposition front bench. It is therefore fresh enough to provide a more vivid example of the process but, as it is over 20 years old, it could also be described as being of historical interest. However, the Commissioner does not agree that it is of "purely" historical interest with no other negative consequence arising from disclosure. For reasons outlined above, it is drafted in a particular style which, the Commissioner accepts, would be less likely to be used were the information to be disclosed in full.
32. In the Commissioner's view, the public interest is well-served by the succinct and focussed approach taken by those who drafted the withheld information. The Commissioner finds there is little public interest in undermining this approach. An incoming Prime Minister should not be expected to read through reams of cautiously drafted and over-written material in their first days in the role.
33. For reasons set out in the Confidential Annex to this Notice, the Commissioner finds that there is only a slim likelihood of such an outcome arising following the disclosure of a small section of the requested information. The Commissioner has concluded that the public interest favours disclosure in relation to this small section of the

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf

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<http://www.instituteforgovernment.org.uk/sites/default/files/publications/Transitions%20-%20preparing%20for%20changes%20to%20government.pdf>

requested information. The Commissioner will now refer to this small section of the requested information as "the remainder".

34. The Commissioner therefore finds that the public interest in the maintenance of sections 36(2)(b)(i) and (ii) and section 36(2)(c) of the FOIA outweighs the public interest in disclosure for the majority of the withheld information. In reaching this view, the Commissioner has had particular regard for the public interest in ensuring that briefings for incoming Prime Ministers in the future are succinct and focussed.
35. The Commissioner has considered whether any of the remainder is exempt under either section 27 or section 40.
36. Section 27(1) (international relations) focuses on the effect of disclosure and provides that information is exempt if its disclosure would, or would be likely to, prejudice:
 - (a) relations between the United Kingdom and any other State;
 - (b) relations between the United Kingdom and any other international organisation or international court;
 - (c) the interests of the United Kingdom abroad; and
 - (d) the promotion or protection by the United Kingdom of its interests abroad.
37. None of the remaining withheld information relates in any way to any of the four provisions of section 27(1). Disclosure of it is not capable of harming the interests described in section 27(1) and there is no causal link between the disclosure and the prejudice claimed.
38. Accordingly, the Commissioner finds that none of the provisions of section 27 are engaged in relation to the remaining withheld information.
39. The Commissioner also finds that the remainder does not contain is not personal data. Information is personal data where it relates to any living identifiable individual and is biographically significant about them. The remainder does not relate to any living identifiable individual. It is therefore not personal data. As such, it cannot be exempt under section 40(2). That exemption only applies to personal data where the disclosure of that personal data would contravene any of the data protection principles of the Data Protection Act ("DPA").
40. The Commissioner has therefore concluded that the information listed in the Confidential Annex to this Notice is not exempt from disclosure under the Act. This information should therefore be disclosed. The

Commissioner's reasoning is also set out in the Confidential Annex to this Notice.

Section 23 – security bodies

Section 24 - national security

41. As noted above, the Cabinet Office refused to confirm or deny whether it held other information within the scope of the request. The public authority has provided the Commissioner with its arguments in respect of these exemptions. They were provided in confidence and will not be repeated in this notice.
42. The Commissioner would also like to stress that he is not personally aware as to whether or not the public authority actually does hold any other information in relation to this request. He does not consider this to be necessary in order for him to make a determination in respect of the "neither confirm nor deny" principles.
43. Information relating to security bodies specified in section 23(3) is exempt information by virtue of section 23(1). Information which does not fall under section 23(1) is exempt from disclosure under section 24(1), if such exemption is required for the purpose of safeguarding national security.
44. Sections 23(5) and 24(2) exclude the duty of a public authority to confirm or deny whether it holds information which, if held, would be exempt under sections 23(1) or 24(1) respectively.
45. By virtue of section 23(5) the duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in section 23(3).
46. By virtue of section 24(2) the duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.
47. The use of sections 23(5) and 24(2) together had been endorsed by the Commissioner and the First-tier Tribunal. The Commissioner does not consider the exclusions at section 23(5) and 24(2) to be mutually exclusive and he accepts that they can be relied upon independently or jointly in order to conceal whether or not one or more of the security bodies has been involved in an issue which might impact on national security. However, each exemption must be applied independently on its own merits. In addition, the section 24 exemption is qualified and is therefore subject to the public interest test.

48. In the Commissioner's opinion the exemption contained at section 23(5) should be interpreted so that it is only necessary for a public authority to show that either confirmation or denial as to whether the requested information is held would involve the disclosure of information relating to a security body. Whether or not a security body is interested or involved in a particular issue is in itself information relating to a security body.
49. Furthermore, the Commissioner believes that the phrase 'relates to' should be interpreted broadly. Such an interpretation has been accepted by the First-Tier Tribunal (Information Rights) in a number of decisions.
50. The test as to whether a disclosure would relate to a security body is decided on the normal civil standard of proof, that is, the balance of probabilities. In other words, if it is more likely than not that the disclosure would relate to a security body then the exemption would be engaged.
51. From the above it can be seen that section 23(5) has a very wide application. If the information requested is within what could be described as the ambit of security bodies' operations, section 23(5) is likely to apply. This is consistent with the scheme of FOIA because the security bodies themselves are not subject to its provisions. Factors indicating whether a request is of this nature will include the functions of the public authority receiving the request, the subject area to which the request relates and the actual wording of the request
52. There is clearly a close relationship between the role of the Prime Minister and the security bodies. In respect of its role, and the subject matter being requested, the Commissioner is satisfied that, on the balance of probabilities, any further information, if held, could well be related to one or more of the bodies identified in section 23(3) of the FOIA.
53. With regard to section 24(2), the Commissioner again considers that this exemption should be interpreted so that it is only necessary for a public authority to show that either a confirmation or denial of whether requested information is held would be likely to harm national security. The Commissioner interprets the phrase 'required' in the context of this exemption to mean 'reasonably necessary'. In effect this means that there has to be a risk of harm to national security for the exemption to be relied upon, but there is no need for a public authority to prove that there is specific, direct or imminent threat.
54. In relation to the application of section 24(2) the Commissioner notes that the Tribunal has indicated that only a consistent use of a 'neither confirm nor deny' (NCND) response on matters of national security can

secure its proper purpose. Therefore, in considering whether the exemption is engaged, and the balance of the public interest test, regard has to be given to the need to adopt a consistent NCND position and not simply to the consequences of confirming whether the specific requested information in this case is held or not.

55. In the context of section 24 the Commissioner notes that the threshold to engage the exemption is relatively low. Furthermore, as a general approach the Commissioner accepts that withholding information in order to ensure the protection of national security can extend, in some circumstances, to ensuring that matters which are of interest to the security bodies are not revealed.
56. On this occasion, the Commissioner is satisfied that confirmation or denial in response to the complainant's requests would be likely to disclose information relating to bodies specified in section 23(3). The need for a public authority to adopt a position on a consistent basis is of vital importance in considering the application of an NCND exemption.
57. Also, the Commissioner accepts it would seem likely that the incoming Prime Minister would be given a briefing on national security matters. The important point to note here is that there was not a change of administration following the 1992 election. The Commissioner accepts, therefore, that it is also reasonable to speculate that a security briefing would not have been given to the Cabinet Office to pass to an incoming Prime Minister until it was known that there was going to be a change of administration. Put another way, confirmation or denial would confirm the timetable by which an incoming Prime Minister is briefed on national security matters.
58. The Commissioner is satisfied that the public authority is entitled to rely on sections 23(5) and 24(2) in the circumstances of this case. He accepts that revealing whether or not information within the scope of the request is held would reveal information relating to the role of the security bodies. Disclosing information about the work of the security bodies would also undermine national security and for that reason section 24(2) also applies.
59. The Commissioner is not able to add any further detail to support the public authority's position however, as mentioned above, further arguments have been provided by the public authority for his consideration only and these have been taken into account in reaching this conclusion.

The public interest

60. Section 23 affords an absolute exemption and no public interest test is required once it is found to be engaged. However, this is not the case of section 24.
61. Having considered the Cabinet Office's further arguments, the Commissioner has considered and balanced the public interest arguments for and against neither confirming nor denying whether further information is held. In this case there are general public interest arguments in favour of confirming whether further information is held, such as openness and transparency in Government. The information, if it were held, would be over 20 years old. However, the Commissioner accepts that this does not mean it is of purely historical interest. As noted above, confirmation or denial would reveal something about the timetable by which an incoming Prime Minister is briefed on security matters. The Commissioner considers that there is a compelling public interest in protecting this operational detail.
62. In the circumstances of this case, the Commissioner considers that the public interest in protecting information required for the purposes of safeguarding national security outweighs the public interest in favour of confirmation or denial. He therefore finds that, in all the circumstances of this case, the public interest in maintaining the exemption at section 24(2) outweighs the public interest in providing confirmation or denial. The Cabinet Office was not, therefore, required to confirm or deny whether further information within the scope of the request was held.

Other matters

63. Whilst there is no explicit timescale laid down by the Act for completion of internal reviews, the Commissioner considers that they should be completed as promptly as possible. The Commissioner believes that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
64. The Commissioner is concerned that in this case, it took 71 working days for an internal review to be completed. The Commissioner does not believe that any exceptional circumstances existed to justify that delay, and he therefore wishes to register his view that the Cabinet Office fell short of the standards of good practice by failing to complete its internal review within a reasonable timescale. He would like to take this opportunity to remind the Cabinet Office of the expected standards in this regard and recommends that it aims to complete its future reviews within the Commissioner's standard timescale of 20 working days.

Right of appeal

65. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

66. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
67. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

**Graham Smith
Deputy Commissioner
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